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IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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:: **J U D G M E N T** ::

The United India Insurance Co. Ltd. Vs. Smt. Rekha & Ors.

S.B. CIVIL MISC. APPEAL NO.1824/2006.

Against the award dated 20.03.2006 made by the Motor Accidents Claims Tribunal [Additional District Judge (Fast Track) No.4], Jodhpur in Claim Case No.281/2005.

Date of Judgment ::: 19th March 2007.

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Jagdish Vyas, for the appellant.
Mr. Rajesh Panwar with
Mr. S.K. Sankhla, for the respondents Nos.1 to 3.
Mr. R.S. Mankad with
Mr. Deelip Kawadia, for the respondent No.4.

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Reportable **BY THE COURT:**

This appeal under Section 173 of the Motor Vehicles Act, 1988 ('the Act'/'the Act of 1988' hereafter) has been preferred by the insurer of a motorcycle bearing registration No. RJ19 7M 0131 being aggrieved of the award dated 20.03.2006 made by the Motor Accidents Claims Tribunal [Additional District Judge (Fast Track) No.4], Jodhpur in Claim Case No.281/2005.

By the award impugned, the Tribunal has allowed the claim application under Section 163-A of the Act made by the wife, minor child and mother of the vehicular accident victim Praveen Solanki (about 33 years); and has awarded compensation in the sum of Rs.4,36,200/- while assessing pecuniary loss at Rs.4,08,000/-, and allowing treatment expenditure at Rs.1,200/- and other components of general damages including mental agony, loss of love and affection, loss of consortium and funeral expenses at Rs.27,000/-. The insurer essentially seeks to question the very competence of the claim application for the reason that the victim Praveen Solanki himself was the driver of the insured vehicle, i.e., the motorcycle bearing registration No. RJ19 7M 0131; and, according to the appellant, liability in relation to the said victim is not covered under the 'Act only' policy for the statutory requirements of compulsory coverage of the risk of persons or classes of persons does not encompass the risk of the driver of such vehicle.

Background facts are that on 26.06.2004 the respondents-claimants made the claim application under Section 163-A of the Act of 1988 with the submissions that on 22.01.2004 at about 7:20 p.m., the victim Praveen Solanki, while proceeding on the said motorcycle bearing number RJ19 7M 0131 from Jodhpur towards Nagaur, was hit from behind by a jeep on main Mandore road in front of RAC Gate No. 2; consequently he collided with an

oncoming motorcycle bearing registration No. RJ19 12M 2531; and due to such collision, riders of the two motorcycles sustained injuries; and Praveen Solanki succumbed to the injuries next day while undergoing treatment. As legal heirs and dependants of the deceased Praveen Solanki, the claimants asserted their entitlement to claim compensation in terms of Section 163-A read with Second Schedule to the Act from the registered owner of the motorcycle RJ19 7M 0131, the non-applicant No.1; and its insurer, the non-applicant No.2.

The claimants sought compensation in the sum of Rs.5,69,166/- with the averments that the deceased Praveen Solanki was about 33 years of age, and was earning Rs.51,500/- per annum while being engaged in marketing of building stones. The claimants averred that the annual income of the deceased was Rs.51,500/- but as the claim was being made under Section 163-A of the Act, they were taking the income of deceased at Rs.40,000/- and giving up the remaining Rs.11,500/-; that with application of multiplier of 17, the income would come to Rs.6,40,000/-; and deducting one-third wherefrom towards personal expenditure of the deceased, the remainder would be Rs.4,26,667/-. The claimants also claimed Rs.20,000/- towards medical expenses, Rs.20,000/- towards funeral expenses, Rs.50,000/- towards loss of love and affection, Rs.50,000/- for the claimant No.1 towards loss of consortium and Rs.2,500/- towards

loss of estate. In paragraph 27(c) of the claim application, it was pointed out that deceased was the son of the owner of the vehicle (non-applicant No.1).

The non-applicant No.1 submitted a reply generally admitting the claim averments; but maintained that the accident was not caused by any mistake or negligence on his part; and that the vehicle was insured with the non-applicant No.2 and the entire liability was that of the said insurer. The non-applicant No.2, insurer, on the other hand submitted a reply stating denial of the claim averments and with the objections and contentions that the relevant documents regarding the incident and cause of death were not supplied; that the motorcycle driver was not holding a valid driving licence; and that the quantum of compensation claimed was highly excessive. It was asserted that the entire claim was baseless because the deceased collided with the oncoming motorcycle while driving his motorcycle rashly and negligently; and the accident occurred for the fault of the deceased Praveen Solanki himself. The insurer averred in the additional submissions that the claimants have not approached with clean hands and, therefore, were not entitled for any compensation; that it would adopt the provisions of Sections 147 and 149 of the Act and would keep the right to submit an amended reply reserved; and that the owner of the motorcycle was father-in-law of the claimant No.1 who did not answer to the

description of 'third party'. The insurer also asserted that the driver, owner, and insurer of the other motorcycle bearing registration No. RJ19 12 M 2531 were necessary parties being equally responsible for the accident. It was also prayed that if at all, interest be allowed only from the date of award @ 6% per annum.

The Tribunal framed the following two issues for determination of the relevant questions involved in the case (reproduced from the memo of issues at page A13/1 of the record):-

> "(1) आया प्रश्नगत् वाहन मोटरसाईकल संख्या RJ19-7M-0131 के उपयोग से दिनाँक 22.01.04 को सांय करिब 7.20 मण्डोर से जोधपुर के रास्ते पर R.A.C. के गेट न. के पास मजार के सामने उक्त वाहन को चला कर की गई दुर्घटना में श्री प्रविण पुत्र दलिपसिंह सोंलकी की मृत्यु कारित हुई ?
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> (2) आया दावेदार अपने दावे/दावों में अकिंत प्रश्नगत् राशि या अन्य कोई न्याय सम्मत् राशि पा सकते है हाँ तो कौन-कौन दावेदार कितनी कितनी राशि किस किस विपक्षी से एवम् किस प्रकार से पा सकते है ?"

In evidence, the claimants examined Smt. Rekha Solanki, the wife of deceased as PW-1 and Vashisth Kachchawaha, an alleged eye-witness to the accident as PW-2; and also produced documentary evidence in the form of attested copies of F.I.R. Ex.1, Postmortem Report Ex.2, Registration

Certificate of motorcycle, RJ19 7M 0131 Ex.3, Driving Licence of the deceased Praveen Solanki Ex.4, and Insurance Cover Note Ex.5; photostat of the Income-tax returns of the deceased for the accounting year 2002-2003 Ex.6A, for the accounting year 2001-2002 Ex.7A and for the accounting year 2000-2001 Ex.8A; and the bills of treatment expenditure Exs. 9 to 13. The non-applicant insurer examined its Assistant Manager Anand Sharma as DW-1 and produced a copy of the insurance policy as Ex.A/1.

After hearing the parties, the Tribunal decided issue No.1 in favour of the claimants with the observations that the claim for compensation was made under Section 163-A of the Act that was based on the principles of no-fault liability and no any negligence on the part of the driver or any other person was required to be proved and it was sufficient if any person suffered loss for the use of a motor vehicle; and in the present case it was proved that the accident occurred for and during the use of motorcycle bearing registration No. RJ19 7M 0131 and there was no rebuttal of the basic facts established by the claimants.

Taking up quantification of compensation in issue No.2, the Tribunal though referred to the income-tax returns of the deceased and the assertion on his monthly income at Rs.5,000/- per month by his wife PW-1 Smt. Rekha; but observed that Section 163-A of the Act provided for maximum of the annual income at Rs.40,000/- and found it reasonable to estimate

average monthly income of the deceased at Rs.3,000/-; and after deducting one-third wherefrom on personal expenditure of the deceased and with application of multiplier of 17, assessed pecuniary loss at Rs.4,08,000/-. The Tribunal further allowed Rs.10,000/- towards mental agony, another Rs.10,000/- towards loss of love and affection and yet another Rs.5,000/- towards loss of consortium; Rs.1,200/- towards medical expenses with reference to the bills Exs. 9 to 13 in the sum of Rs.1,131.83; and further Rs.2,000/- towards funeral expenses; and in this manner made the award in the sum of Rs.4,36,200/- in favour of the claimants and allowed them interest @ 7.5% per annum from the date of filing of the claim application and directed the appellant-insurer to deposit the amount payable under the award within two months.

Aggrieved by the award aforesaid, the insurer has preferred this appeal taking the grounds that the Tribunal has failed to consider the significant aspects of the matter that the motorcycle in question belonged to the father of the deceased; that the deceased himself was driving the said motorcycle at the time of accident and he does not fall in the category of 'third party'; and that the appellant has not charged any premium to cover the risk of the person riding the motorcycle; and hence, even under Section 163-A of the Act, liability to pay compensation could not have been mulcted upon the appellant-insurance company. It

has also been submitted that from the First Information Report and the Final Report, it is clear that the accident occurred for negligence of an unknown jeep and for this reason too, liability to pay compensation could not have been fastened on the appellant, the insurer of motorcycle. The rate of interest at 7.5% per annum has also been questioned.

At the request of the learned counsel for the parties, and in view of the points raised and the questions involved, the matter has been heard finally at this stage.

Arguing for the appellant-insurer, learned counsel Mr.Jagdish Vyas has strenuously contended that the deceased did not answer to the description of 'third party' for the purpose of coverage under the insurance policy in question and, therefore, the Tribunal has been in error in making the award of compensation in this case against the appellant. Learned counsel emphasized that under the statute, there is no requirement to cover the risk of a driver of the motor vehicle; that compulsory coverage is envisaged only in respect of the passengers of a public service vehicles [Section 147(1)(b)(ii)] and the owner or his authorised representative of the goods [Section 147(1)(b)(i)]; and that only under the proviso (i)(a) to Section 147 (1) of the Act, liability arising under Workmen’s Compensation Act in relation to the driver who is an employee of the insured has been indicated. Learned counsel referred to the decision of this

Court in United India Insurance Co. Ltd. Vs. Hamu Ram & Ors. : 2004 RAR 308 to submit that the legislature has divided the victims in two categories; one being the passengers in the vehicle and second being the others; and the passengers again fall in various categories, like the driver, or the conductor examining the tickets, or the employees not exceeding six in numbers being carried in the vehicle, or the passengers being carried for hire or reward; and in respect of each of such persons different limits have been prescribed. Learned counsel submitted that the expression 'any person' does not include the passengers particularly for the purpose of compulsory insurance coverage; and referred to the decision of the Hon'ble Supreme Court in Dr. T.V. Jose Vs. Chacko P.M. alias Thankachan & Ors. : 2001 AIR SCW 3910 to submit that 'third party' insurance does not cover the risk of passengers who are not carried for hire or reward and in absence of any contract to the contrary, it cannot be accepted that third party insurance covers the liability towards the occupants of a private vehicle. Learned further submitted that the deceased himself was negligent and was exclusively responsible for the accident and for the resultant loss; and Section 163-A cannot be interpreted in the manner that compensation would be awarded even for the negligence of the victim himself. Learned counsel put forward for comparison the provisions as made in sub-section (4) of Section 140 of the Act providing that a claim

for compensation for no fault liability under Section 140 is not defeated by reason of any wrongful act, neglect or default of the victim concerned and contended that no such provision has been made in the scheme of Section 163-A of the Act while again making special provisions for payment of compensation, though on structured formula basis, but irrespective of the wrongful act, neglect or default on the part of the owner of the vehicle. Learned counsel urged that if the legislative intent was to provide for compensation even for his own wrong to a victim of vehicular accident under Section 163-A, a provision similar or akin to sub-section (4) of Section 140 would have been made in the scheme of Section 163-A (2) of the Act and such omission cannot be said to be insignificant. Learned counsel further referred to the case of Appaji (since deceased) & Anr. Vs. M. Krishna & Anr. : 2004 ACJ 1289 and submitted that the Hon'ble Division Bench of Karanataka High Court has dealt with the point in sufficient detail and held that the Parliament did not intend to provide compensation to the person responsible for the accident on the structured formula. During the course of submissions, learned counsel has placed for perusal a copy of another award dated 12.08.2005 made by the Motor Accidents Claims Tribunal (First), Jodhpur in Claim Case No.95/2005 relating to the same accident wherein the dependants of Heera Lal, rider of the other motorcycle bearing No. RJ19 12M 2531, claimed compensation

against the owner and insurer (appellant) of the vehicle bearing No. RJ19 7M 0131 and therein too, claim for compensation under Section 163-A of the Act has been allowed against the appellant-insurer.

Called upon to answer, learned counsel appearing for the respondents submitted in the first place that the contentions sought to be urged in this appeal remain fundamentally baseless for no such plea was ever taken by the insurer in its reply before the Tribunal that the risk of the driver of the motorcycle was not covered under the policy in question; that they did not plead that the deceased (Praveen Solanki) was not a 'third party'; that paragraph 2(a) of their reply is not to the effect that the risk of the said driver of motorcycle was not covered as a third party risk; and that no such case is made out even in the statement of DW-1. Learned counsel also referred to the connotation of 'Liability only' policy with reference to certain stipulations issued by the appellant United India Insurance Company Limited and submitted that under clause (3) of the said policy, on the liability to third party the appellant-insurance company has provided that it shall indemnify any driver who is driving the motor vehicle on the insured's order or with insured's permission provided that such driver observes and fulfills the terms and conditions of the policy as if he was the insured; and, learned counsel contended with reference to the said clause, that the risk of the driver is also

covered thereunder. Learned counsel further submitted that the driver of a motor vehicle is not a passenger and his risk cannot be excluded under Section 147(1) of the Act; and that none of the authorities cited by the learned counsel for the appellant says that the risk of the driver is not covered. Learned counsel referred to the phraseology of Section 163-A of the Act and submitted that the risk of driver is also intended to be included as the words 'driver' are specifically omitted in the said provision. Learned counsel then referred to the decision of the Hon'ble Supreme Court in Deepal Girishbhai Soni & Ors. Vs. United India Insurance Co. Ltd. : (2004) 5 SCC 385 and particularly relying on paragraph 66 submitted that with the authoritative pronouncement of the Hon'ble Supreme Court it is clear that Section 163-A of the Act covers the cases even where negligence is on the part of the victim. Learned counsel also referred to a decision of the Division Bench of Hon'ble Punjab & Haryana High Court in the case of New India Assurance Company Ltd. Vs. Shyamo Chauhan & Ors. : 1 (2005) ACC 856 wherein the deceased was driving the motorcycle and was negligent for the accident, yet the owner and insurance company were held liable to pay compensation to the heirs of the deceased under Section 163-A of the Act. Learned counsel also pointed out while citing a decision in the case of New India Assurance Co. Ltd. Vs. Sunil & Anr. : 2006 AIHC 1746 that with reference to the decision in Deepal Girishbhai

Soni's case (supra), the Hon'ble Karnataka High Court has held that its decision in Appaji's case (supra) cannot be pressed in support of the contention that when negligence is on the part of the victim, provisions of Section 163-A shall not apply.

Learned counsel for the appellant rejoined with the submissions that paragraph 2(a) of additional submissions in the reply before the Tribunal is clearly meant to convey the plea that the present one is not a case of coverage of third party and, therefore, it is wrong to contend that the plea was not taken before the Tribunal. Learned counsel pointed out that clause (3) of the 'Liability only' policy is only to the effect that if any liability is incurred by the driver of the vehicle, and if he otherwise fulfills all the conditions as are required of the insured, then such liability would also be indemnified; and the said clause is not intended to provide for coverage of the risk of the driver himself. In respect of the decision of the Hon'ble Supreme Court in the case of Deepal Girishbhai Soni (supra), learned counsel submitted that the questions involved in the present case were not the subject matter of controversy before the Hon'ble Supreme Court; and further submitted that the judgments cannot be read as statutes and the said decision in Deepal Girishbhai Soni cannot be read as if the Hon'ble Supreme Court has laid down the law that even in respect of the victim whose risk was not otherwise covered, a claim for compensation could be maintained under Section 163-A

of the Act against the insurer too.

Submissions of the learned counsel for the parties have been given thoughtful and anxious consideration with reference to the law applicable, and entire record of the case has been examined.

The substratum of submissions of the learned counsel for the appellant-insurer has been that the statute does not require compulsory coverage of the risk of the driver of the motor vehicle and, therefore, no liability in his relation could be fastened on the insurer even if it were an application under Section 163-A of the Act; and that the legislature never intended to provide for compensation under Section 163-A of the Act to the victim or his heirs for the exclusive fault or negligence of the victim himself.

For the purpose of dealing with the submissions made at the Bar, it is relevant to refer to the provisions of Section 163-A of the Act that read thus:

> **"163-A. Special provisions as to payment of compensation on structured formula basis.-**(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

> *Explanation.* - For the purpose of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).
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> (2) In any claim for compensation under sub-section(1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.
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> (3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

Provisions of Section 140 of the Act having some bearing on the points raised may also be noticed thus:

> "**140. Liability to pay compensation in certain cases on the principle of no fault**.- (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.
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> (2) The amount of compensation which shall be payable under sub-section (1) in respect of the death of any person shall be fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-section in respect of permanent disablement of any person shall be a fixed sum of twenty-five thousand rupees.

> (3) In any claim for compensation under sub-section(1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.
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> (4) A claim for compensation under sub-section(1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.
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> (5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force :
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> Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under Section 163-A."

It shall be apposite to notice the provisions of Section 147 of the Act regarding the requirements of policies and limits of liability that read thus:

"**147. Requirements of policies and limits of liability**.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which -

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) -

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required -

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:-

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

> (4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.
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> (5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

It shall be profitable to refer to sub-section (1) of Section 149 of the Act too that reads thus:

> "**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.**- (1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person

> entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."
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> [emphasis supplied]

Before proceeding further, it appears necessary to point out that Sections 163-A and 163-B were inserted in the statute (the Act of 1988) by the Amendment Act No.54 of 1994 with effect from 14.11.1994 and were placed in Chapter XI of the Act of 1988 dealing with 'Insurance of Motor Vehicles Against Third Party Risks'; and that the words 'or under the provisions of Section 163-A' were simultaneously inserted in Section 149(1) of the Act by the said Amendment Act No.54 of 1994. Then, a bare look at Section 163-A of the Act is sufficient to bring about a unique feature that it starts with non-obstante clause of widest amplitude by stating 'Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law'. Taking into comprehension other provisions of the Act and the purpose sought to be achieved by introduction of Section 163-A, it is clear that the said provision is meant to be a special provision and to over-ride any other provision in the Act itself or any other law. Thus, in case of any

divergence or incongruity; or in case of any contradiction or conflict, the provisions of Section 163-A of the Act would over-ride, would prevail over, and have their operation, plain and clear.

It is true that earlier a line of thought took such provisions in Section 163-A of the Act as a mere extension of no-fault liability as introduced by Section 92-A of the Act of 1939 and then reinforced by Section 140 of the Act of 1988; and thus, the Division Bench of the Hon'ble Karnataka High Court in Appaji's case (supra) held that before liability under Section 163-A of the Act arises against the insurance company, it is essential that the liability must first arise against the insured. While dissenting with the decision of a Division Bench of Hon'ble Himachal Pradesh High Court in Kokla Devi Vs. Chet Ram: 2002 ACJ 650, the Hon'ble Karnataka High Court did not agree with the view that Section 163-A has brought about a drastic change in the concept of tortious liability prevailing prior to it. The Karnataka High Court held that Section 163-A of the Act brings about a significant change in the legal position so far the obligation to prove fault is concerned, but the change is not so drastic as to make even a tortfeasor entitled to claim compensation for his own act of rashness, negligence or imprudence. According to the said High Court in Appaji' case (supra), the correct approach was to find out whether in absence of section 163-A, a claim could have been made on the facts pleaded by the claimants and if the answer

was 'no' because the claimant himself was a tortfeasor, the provisions of Section 163-A would not come to his rescue and make such a claim maintainable; and, according to the High Court, if the answer was in 'yes', the beneficial provisions under Section 163-A would absolve the claimant of obligation to prove that the accident had taken place on account of the fault of the driver or owner of the vehicle. The High Court in the same decision in Appaji's case (supra) did not agree with the view of the Hon'ble Division Bench of the Gujarat High Court as stated in the case of New India Assurance Co. Ltd. Vs. Muna Maya Basant: 2001 ACJ 940 that for the non-obstante clause appearing in Section 163-A even the tortfeasor could claim compensation; and that the insurance company could contest the claim only on the ground of total absence of a contract of insurance and not otherwise. While rendering the decision in Appaji's case (supra), the Hon'ble Karnataka High Court had before it a decision of the Hon'ble Supreme Court in Oriental Insurance Co. Ltd. Vs. Hansrajbhai V. Kodala : 2001 ACJ 827 (SC) and observed that on the ratio of the said decision, the non-obstante clause (of Section 163-A) simply excludes determination of compensation on the principle of fault liability; and that the said provision does not permit a person to place a premium upon his own fault and make the insurance company pay for the same.

The decision in Hansrajbhai V. Kodala (supra) was

rendered by the Hon'ble Supreme Court when the question arose as to whether the compensation payable under Section 163-A as per the structured formula basis is in addition or in the alternative to the determination of the compensation on the principle of fault liability? The Apex Court, after examining the scheme of the related provisions in the previous Act and the reasons for entertaining a claim for compensation under Section 163-A of the Act, found that the determination of compensation under Section 163-A is final and not of interim measure and noticed the significant feature that the legislature has deliberately not provided it to be in addition to the compensation payable on the principles of fault liability as was the case with Section 140 of the Act. Thus said the Hon'ble Supreme Court:

> "(1) There is no specific provision in the Act to the effect that such compensation is in addition to the compensation payable under the Act. Wherever the legislature wanted to provide additional compensation, it has done so. (Sections 140 and 141).
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> (2) In case where compensation is paid on no fault liability under sections 140 and 161 in case of 'hit and run motor accident' the legislature has provided adjustment or refund of the said compensation in case where compensation is determined and payable under the award on the basis of fault liability under section 168 of the Act. There is no such procedure for refund or adjustment of compensation paid where the compensation is paid under section 163-A.
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> (3) The words 'under any other law for the time being in force' would certainly have different meaning from the words 'under this

> Act' or 'under any other provision of this Act'.
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> (4) In view of the *non-obstante* clause 'notwithstanding anything contained in this Act' the provisions of section 163-A would exclude determination of compensation on the principle of fault liability.
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> (5) The procedure of giving compensation under section 163-A is inconsistent with the procedure prescribed for awarding compensation on fault liability. Under section 163-A compensation is awarded without proof of any fault while for getting compensation on the basis of fault liability claimant is required to prove wrongful act, neglect or default of the owner of the vehicle or vehicles concerned.
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> (6) Award of compensation under section 163-A is on predetermined formula for payment of compensation to road accident victims and that formula itself is based on criteria similar to determining the compensation under section 168. The object was to avoid delay in determination of compensation."

However, correctness of the propositions as laid down in Hansrajbhai V. Kodala's case were doubted by another Division Bench of the Hon'ble Supreme Court and the matter was referred to a Three-Judges Bench; and thereupon the decision was rendered in Deepal Girishbhai Soni & Ors. Vs. United India Insurance Co. Ltd.: (2004) 5 SCC 385.

The subject matter of appeals before the Hon'ble Supreme Court in Deepal Girishbhai Soni's case were, inter alia,

from the judgment and order of the Hon'ble Gujarat High Court wherein the position was that the appellants had filed two claim applications, one under Section 163-A and another under Section 166 of the Motor Vehicles Act claiming compensation for the death of their parents. On the applications in terms of provisions of Section 163-A, taking that only the interim award was to be made, the Tribunal on 24.03.2001 allowed certain amount with interest but directed that the application filed under Section 166 of the Act shall be determined separately. The matter was taken in appeal by the insurance company and having regard to the contention made at the Bar and in view of the cap on annual income at Rs.40,000/- as contained in Second Schedule appended to the Act, the award amount was reduced by the High Court accordingly. The claimants-appellants were aggrieved of such reduction and petitions were also filed seeking review of the decision in Hansrajbhai V. Kodala.

It was contended before the Hon'ble Supreme Court while questioning correctness of the decision in Hansrajbhai V. Kodala (supra) that the Act has provided different remedies against the tortfeasors for obtaining just compensation and the remedy in terms of Section 166 cannot be taken away only for making of an award in terms of the provisions of Section 163-A of the Act because claim of compensation filed under this section is not adjudicated upon and merely the “adequate compensation”

allowed by the Tribunal is to be paid. It was also contended that the Act provides for choice of filing of claim applications under Sections 140 or 163-A and thus the remedy provided under Section 166 is not barred and there is no reason why the award made under Section 163-A should be treated as final.

It was in such background that the Hon'ble Supreme Court referred to the entire legislative history leading to the concept of 'no-fault liability' and its operation in Section 92-A of the Act of 1939 to Section 140 of the Act of 1988 and then, the reasons for introduction of Section 163-A and its scheme. The Hon'ble Supreme Court held that Section 163-A was introduced in the Act by way of social security scheme and that it is a Code by itself. The Supreme Court pointed that Section 140 of the Act dealt with interim compensation but by inserting Section 163-A, the Parliament intended to provide for making of an award consisting of a predetermined sum without insisting on a long-drawn trial or proof of negligence in causing the accident. The amendment was, thus, a deviation from the common law liability under the law of torts and was also in derogation of the provisions of the Fatal Accidents Act. Reading the provisions of Section 140 and Section 163-A of the Act, the Hon'ble Supreme Court pointed out,-

> “45. Sub-section (4) of Section 140 provides that the claim for compensation under sub-section (1) thereof shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the

claim has been made nor the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement. Sub-section (5) of Section 140 of the Act categorically provides that the obligation of the owner of the vehicle shall not be in derogation of any statutory duty cast upon the owner of the vehicle to pay compensation under any other law for the time being in force subject, however, to the condition as has been laid down in the proviso appended thereto that the amount of such compensation to be given under any other law should be reduced from the amount of compensation payable thereunder or under Section 163-A.

46. Section 163-A which has an overriding effect provides for special provisions as to payment of compensation on structured-formula basis. Sub-section (1) of Section 163-A contains non obstante clause in terms whereof the owner of the motor vehicle or the authorised insurer is liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. Sub-section (2) of Section 163-A is in pari materia with sub-section (3) of Section 140 of the Act.

47. Section 163-A does not contain any provision identical to sub-section (5) of Section 140 which is also indicative of the fact that whereas in terms of the latter, the liability of the owner of the vehicle to give compensation or relief under any other law for the time being in force continues subject of course to the effect that the amount paid thereunder shall be reduced from the amount of compensation payable under the said section or Section 163-A.

> 48. By reason of Section 163-A, therefore, the compensation is required to be determined on the basis of a structured formula whereas in terms of Section 140 only a fixed amount is to be given. A provision of law providing for compensation is presumed to be final in nature unless a contra-indication therefor is found to be in the statute either expressly or by necessary implication. While granting compensation, the Tribunal is required to adjudicate upon the disputed question as regards age and income of the deceased or the victim, as the case may. Unlike Section 140 of the Act, adjudication on several issues arising between the parties is necessary in a proceeding under Section 163-A of the Act."

The Hon'ble Supreme Court ultimately held that the remedy both under Section 163-A and Section 166 being final and independent to each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both and held that the contention in Hansraj V. Kodala's case that the right to get compensation (under Section 163-A) is in addition to the no-fault liability was rightly rejected. The Hon'ble Supreme Court also pointed out that in terms of Section 140 of the Act, the owner of the vehicle has been fastened with the statutory liability and in Section 163-A thereof both the owner as also his authorised insurer has been made so liable. While ruling on the scope of Section 163-A of the Act, the Hon'ble Supreme Court held in paragraph 66 thus:

> "66. We may notice that Section 167 of the Act provides that where death of, or bodily injury to, any person gives rise to claim of compensation under the Act and also under the Workmen's Compensation Act, 1923, he cannot claim compensation under both the Acts. The Motor Vehicles Act contains different expressions as, for example, "under the provision of the Act", "provisions of this Act", "under any other provisions of this Act" or "any other law or otherwise". In Section 163-A, the expression "notwithstanding anything contained in this Act or in any other law for the time being in force" has been used, which goes to show that Parliament intended to insert a non obstante clause of wide nature which would mean that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force. Section 163-A of the Act covers cases where even negligence is on the part of the victim. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of."
>
> (emphasis supplied)

The Hon'ble Supreme Court, therefore, agreed with the ratio of Hansrajbhai V. Kodala (supra) but did not agree with the finding that if a person invokes the provisions of Section 163-A, annual income of Rs.40,000/- per annum shall be treated as a cap and held that all other claims are required to be determined in terms of Chapter XII of the Act.

Thus, it is clear that the scheme of Section 163-A of the Act has come on its fuller exposition by the Hon'ble Supreme Court in

the cases of Hansrajbhai V. Kodala and Deepal Girishbhai Soni and there remains no doubt with these pronouncements that Section 163-A of the Act covers the cases where the negligence is on the part of the victim himself.

There is no quarrel that the judgments of the courts are not to be read as statutes and it is the ratio only that is required to be culled out and applied but then, the position of law declared by the Hon'ble Supreme Court remains binding on all the courts and for that matter even when any observation of the Hon'ble Supreme Court could be termed as obiter, the same does not only carry considerable force and weight; but is followed unless there being any decision to the contrary by the Hon'ble Supreme Court. The Hon'ble Karnataka High Court in New India Assurance Co. Ltd. Vs. Sunil & Anr. (supra) has referred to their decision in Appaji (supra) and observations to the contrary by the Hon'ble Supreme Court in Deepal Girishbhari Soni's case (supra) and though read them as obiter dictum but found that the Hon'ble Supreme Court in clear terms has stated that the provisions of Section 163-A would apply despite the contrary provisions existing in the said Act or any other law for the time being in force and then said that the provisions of Section 163-A of the Act covers even the cases where negligence is on the part of the victim; and rejected the contention of the insurer seeking to draw a pseudo-distinction between the cases of partial contributory

negligence and exclusive negligence on the part of the victim.

This court is of opinion that in the context of the decision in Deepal Girishbhai Soni's case (supra), the observations of the Hon'ble Supreme Court in paragraph 66 as noted above cannot be termed as mere obiter dictum. As noticed above, the matter was referred to the Larger Bench of the Hon'ble Supreme Court for the reason that correctness of the decision of Hansrajbhai V. Kodala was doubted and then the entire scheme of Section 163-A of the Act was before the Hon'ble Supreme Court for interpretation in order to rule on its true and correct operation. This Court is clearly of opinion that in view of the decision of the Hon'ble Supreme Court in Deepal Girishbhai Soni's case, the law is required to be taken as well settled that Section 163-A of the Act covers the cases even where the negligence is on the part of the victim and that provisions of Section 163-A of the Act have their effect overriding other provisions of the Act.

It may be pointed out that the submission made on behalf of the insurer with reference to sub-section (4) of Section 140 is neither of any meaning nor of any assistance for the question at hands because as noticed above, liability to pay compensation under Section 140 of the Act has been ruled to be essentially of interim measure and being in addition to Section 166 of the Act. In order to make the provisions of sub-sections (1) and (2) of Section 140 meaningful and operative, sub-section (4) has been

inserted thereto so that such fixed amount compensation for no fault liability is not defeated for any contribution on the part of the victim towards the accident and the injuries. Omission of such provision in Section 163-A does not lead to the effect that Section 163-A would not cover the cases where negligence is on the part of the victim. In fact, such provision as sub-section (4) of Section 140 was neither needed nor could have been there in Section 163-A of the Act, that being a Code in itself and intended to provide relief as a social security measure notwithstanding anything else contained in the Act or any other law. In view of the law explained by the Hon'ble Supreme Court in Hansrajbhai V. Kodala and Deepal Girishbhai Soni, the submission to the contrary by the insurer cannot be countenanced.

Other submission made on behalf of the insurer about an award having been made against it, again under Section 163-A of the Act in favour of the heirs and dependents of the rider of the other motorcycle, has no adverse impact on the competence of the present claim; and if at all, the said award precisely brings to the fore the sweep of Section 163-A of the Act where compensation has been allowed for the loss arising due to the accident that occurred for the use of the motorcycle insured by the appellant.

In the ultimate analysis, the submission as made by the learned counsel for the insurer that the claim for compensation

could not have been maintained for negligence of the victim himself deserves to be and is rejected.

Apart from the aforesaid, noteworthy it is that in the present case, the appellant-insurer has not even come out with specific case that the accident occurred for exclusive fault of the victim Praveen Solanki. In their reply before the Tribunal, the appellant took the plea that the accident occurred for the fault of the deceased Praveen Solanki himself; and also took the plea that the driver, owner, and insurer of the other motorcycle bearing registration No. RJ19 12 M 2531 were necessary parties being equally responsible for the accident. Then, in the present memo of appeal the ground taken is that the FIR and FR make out that the accident occurred on account of negligence of unknown jeep. Be that as it may, as noticed, even if the accident had occurred for any contribution on the part of the victim, it is certain that he died due to an accident arising out of the use of the motor vehicle insured by the appellant; and, thus, the appellant cannot avoid its liability under Section 163-A of the Act.

The other limb of submission of the learned counsel for the appellant-insurer has been that the victim himself was the driver of the motorcycle and, being not compulsorily required to be covered under Section 147 of the Act, risk in his relation was not covered under the insurance policy and hence, the Tribunal has been in error in fastening the liability on the appellant. The

submission on its face appears wee bit attractive but turns out to be hollow and baseless.

A close look at the provisions of Section 163-A of the Act makes it clear that the said provision overrides every other provision of the Act and, as pointed by the Hon'ble Supreme Court, is a Code in itself; and it operates notwithstanding anything contained in the Act or in any other law for the time being in force or any instrument having the force of law. Under the said provision, owner of the motor vehicle and its authorised insurer have been made liable to pay compensation for the loss (for death or permanent disablement) arising out of use of motor vehicle; and the amount of such compensation has been quantified in the Second Schedule appended to the Act. The submission as made by the learned counsel for the appellant-insurer with reference to Section 147 of the Act is required to be rejected for the fundamental reason that in the present case, claim for compensation has been dealt with under Section 163-A of the Act and NOT under Section 166 of the Act. Once, it is clear that Section 163-A of the Act overrides every provision of the Act itself, it necessarily follows that it overrides even Section 147 of the Act. The submission that compulsory coverage under Section 147 of the Act is only in relation to certain classes of persons and that the driver of the vehicle, and for that matter a passenger, is not required to be covered and he does not answer

to 'third party' are all fundamentally irrelevant for the reason that the liability of the authorised insurer under Section 163-A stands notwithstanding anything contained in the Act; obviously notwithstanding anything contained in Section 147 either. The decision of the Hon'ble Supreme Court in Dr. T.V. Jose (supra) and that of this Court in United India Insurance Co. Ltd. Vs. Huma Ram & Ors. (supra) being not related to this liability under Section 163-A of the Act evidently rule out their relevance or applicability to the present case

The peculiar aspect that Section 147 of the Act as such limiting the coverage would not be applicable for the purpose of Section 163-A of the Act could be readily noticed from sub-section (1) of Section 149 of the Act. Under the said provision when a certificate of insurance has been issued under Section 147(3) of the Act in favour of the person by whom a policy has been effected and a judgment or award is obtained against a person insured with the policy, the insurer has been made liable as a judgment-debtor for the liability together with the amount of interest. And, the liability concerned has been distinctly stated: (i) “as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy)”; or (ii) “under the provisions of Section 163-A”.

It is absolutely clear that while inserting Section 163-A in the Motor Vehicles Act, 1988, the legislature has taken care of

making it meaningfully clear and unambiguous in its operation by specifying in Section 149 of the Act that the liability under Section 163-A of the Act is separate and distinct from the liability under Section 147(1)(b) of the Act; and the insurer is under an obligation to bear the same.

Only the liability under Section 147(1)(b) of the Act has been referred by the appellant-insurer in support of its contention that the driver was not compulsorily required to be covered under the insurance policy. The argument misses the crux of the matter that the liability under Section 163-A of the Act is distinct from the liability under Section 147 of the Act. It is for this reason that Section 163-A refers to the liability of the owner of the motor vehicle or of the authorised insurer and once the appellant has been the authorised insurer, its liability under Section 163-A, remains and operates alongside, and, if necessary, irrespective, of the provisions of Section 147 of the Act.

The Division Bench of Hon'ble Gujarat High Court in the case of New India Assurance Co. Ltd. Vs. Muna Maya Basant: 2001 ACT 940 has dealt with the matter in sufficient detail, though the said decision was rendered before the decision of Hon'ble Supreme Court in Deepal Girishbhai Soni's case (supra). The said decision in Muna Maya Basant (supra) was of course disagreed to by the Hon'ble Karnataka High Court in Appaji's case (supra) and, as already noticed, ratio of Appaji's case itself

is eclipsed by the decision of the Hon'ble Supreme Court in Deepal Girishbhai Soni's case (supra). In the said case of Muna Maya Basant, on the operation of Section 163-A of the Act, the Division Bench of Hon'ble Gujarat High Court said,-

> "The insurance company who is the appellant can challenge the claim only on the ground of no contract at all, i.e., no insurance, or on the above-stated grounds. It may be stated that it is not the case of the appellant that the vehicle in question was not insured with it or that the insurance was not in force at the time of accident."

and further,-

> "Under the Act, the liability of the insurance company is statutory and that can be spelt out from section 147. Charging extra premium, the insurance company may prefer to cover higher liability or risk or unlimited liability. In any case, therefore, the contractual liability will not be less than the statutory liability. It may be stated that by introduction of section 163-A, the liability as arising thereunder must now be deemed to have been covered under statutory liability regardless of the pecuniary limit in that regard specified in the policy, or premium charged. <u>In other words, the limits of the statutory liability should be deemed to have been extended or enlarged appropriately so as to cover the liability that arises under Section 163-A."</u>
>
> (emphasis supplied)

When the insurer has undertaken 'Act only' liability, and the enactment itself provides a liability under Section 163-A with much wider non-obstante clause, this Court finds itself in

agreement with observations of the Hon'ble Gujarat High Court that the insurance company could resist the claim only on the ground of no contract at all. It is noticed from the cover note Ex.5 that the appellant-insurer has proceeded to issue Act only policy and this 'Act only' policy obviously means that statutory liability under the enactment is intended to be covered. It would be a misnomer to suggest the meaning of 'Act only' liability while looking at Section 147 of the Act only, and in the name of 'Act only' policy, the insurer cannot simply forget about Section 163-A of the Act nor could by-pass the requirements of these over-riding provisions. The 'Act only' policy issued by the appellant covers all the liabilities arising under the Act which are required to be taken care of; and when there is a liability in the owner of the vehicle under Section 163-A of the Act, the appellant-insurer is required to indemnify. In the aforesaid view of the matter, this Court is clearly of opinion that the submissions made by the learned counsel for the appellant in relation to non-coverage of risk of the driver cannot be accepted and are, therefore, rejected.

It may be pointed out that the argument on behalf of the claimants-respondents with reference to Clause (3) of the “Liability only” policy is of course incorrect because the said clause only relates to the liability undertaken by the insurer to indemnify the driver, i.e., the liability if so incurred by the driver, and not qua the driver. However, the said argument needs no

further dilatation for the conclusion this Court has reached that the insurer remains liable under the scheme of Section 163-A of the Act; and it cannot obviate such liability.

It has been noticed while scanning through the record that the Tribunal has, of course committed an error in awarding Rs.10,000/- in the name of so-called mental agony and another Rs.10,000/- towards loss of love and affection. Such components of loss are not envisaged by Second Schedule to the Act of 1988 and ought not to have been awarded. However, it is noticed that the Tribunal has taken the income of the deceased only at Rs.3,000/- per month (i.e. Rs.36,000/- per annum) though the claimants asserted such income at Rs.51,500/- per annum but limited their claim to Rs.40,000/- per annum. With reference to the tax-return Ex.6, it is noticed that the deceased had his income from business and profession at Rs.42,000/- per annum and from other sources at Rs.9,500/- per annum. In this view of the matter, this Court is of opinion that though such component of Rs.20,000/- has wrongly been awarded under the heads of mental agony and loss of love and affection but such an amount could reasonably be allowed towards pecuniary loss and, therefore, the amount of compensation ultimately awarded by the Tribunal cannot be said to be so excessive as to warrant interference in appeal. Similarly, the rate of interest at 7.5% per annum cannot be said to be wholly unjustified in the overall

circumstances of this case. The award in question calls for no interference.

As a result of the aforesaid, this appeal fails and is dismissed. There shall be no orders as to costs.

The amount payable, if not deposited by the insurer so far, shall be deposited within 30 days with the Tribunal.

Mohan/ **(DINESH MAHESHWARI), J.**